No. 01-1883

IN THE

SUPREME COURT OF THE UNITED STATES

FEDERAL INSURANCE COMPANY,

Petitioner,

v.

KENNETH R. JONES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY OF PETITIONER

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Now comes Petitioner Federal Insurance Company ("Federal") in reply to the additional points raised in Respondents' Brief in Opposition to Federal's Petition for Writ of Certiorari. Federal refers this Honorable Court to the Corporate Disclosure statement contained in its original Petition for Writ of Certiorari, which remains accurate.

A. Respondents' reliance on the collateral order doctrine to ameliorate the conflict between the Circuits is misplaced.

Respondents assert that no conflict between the Circuits exists because the Sixth Circuit reviewed the District Court's remand order to determine if it was "based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." (App. A to Petition at p. 4a.) The application of the collateral order doctrine was the first step in the analysis of the Third and Fourth Circuits, however, not the complete analysis.

Respondents cite three cases in support of the assertion that the Third, Fourth, Tenth, and Sixth Circuits review remand orders only to determine the applicability of the collateral order doctrine: *Borneman v. United States,* 213 F.3d 819, 824-26 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *Carr v. American Red Cross*, 17 F.3d 671 (3d Cir. 1994); and *Aliota v. Graham*, 984 F.2d 1350 (3d Cir. 1993), *cert. denied*, 510 U.S. 817 (1993). Respondents' assertion is incorrect. In each of the three cases, the Circuit Court looked beyond whether there was a collateral order on the merits to determine whether the remand order was reviewable.

In *Carr*, 17 F.3d at 679, the Third Circuit first determined whether a collateral final order which was reviewable was present. The court found "that we have

jurisdiction to review the district court's dismissal of Red Cross, regardless of our authority to review the district court's remand order." *Id.* Unlike the Sixth Circuit in the instant case, the court continued its analysis: "[w]e must now consider the question of the reviewability of the district court's remand order separate and apart from the reviewability of the order preceding remand." *Id.* The Third Circuit then forthrightly stated that "we have taken the progression [of the review of remand orders] one step further and have permitted appellate review of remand orders which are based on a district court's underlying jurisdictional determination which is inconsistent with a specific Congressional grant of federal jurisdiction." Respondents quote from the following paragraph of the court's opinion, but they omit the first line:

> This progressive development leads us now to hold that the sounder, *and additional*, approach to permitting review of a 1447(d) remand order is that where a district court's dispositive order—whether substantive or jurisdictional—is separable from the subsequent order of remand, and meets the finality requirement of §§ 1291, and where that final order triggers an order of remand, as it does here, the remand order itself must also be reviewable by the Court of Appeals.

Id. (emphasis added).

The broader scope of review utilized by the Third Circuit is in direct conflict with the Sixth Circuit's review here because the Sixth Circuit declined to determine whether the district court's remand was "inconsistent with a specific Congressional grant of federal jurisdiction." *Id.*; *accord*, *Aliota*, 984 F.2d at

1357 (" '[T]he district court's remand order was a departure so lacking in statutory basis, and so clearly contrary to Congressional policy as expressed in the Westfall Act, as to require our review by mandamus.' "), quoting *Nasuti v. Scannell*, 906 F.2d 802, 811 (1st Cir. 1990).

In *Borneman*, 213 F.3d at 825-26, the Fourth Circuit echoed the analysis in *Carr*. After first determining whether a collateral order existed to support jurisdiction, the Court went on to state that "even if a remand order does not in this oblique manner become subject to review when its underlying premises are appealed, §1447(d)'s restriction on appellate review of remand orders cannot be read categorically when other statutes in tension with it are considered." *Id.* at 825. The Fourth Circuit went on to hold that, as the Attorney General's scope-of-employment certification conclusively established the district court's jurisdiction, "the bar of §1447(d) does not preclude us from reviewing a remand order when the district court exceeds its authority." *Id.* at 826.

Respondents assert that the Circuits are not in conflict because all equally apply the collateral order doctrine. But, the Third, Fourth, and Tenth Circuits go far beyond the borders of this doctrine to review, in limited scope, the validity of the legal basis of the district court's remand order. Respondents do not even attempt to harmonize the review conducted in *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 845, (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) or *Dalrymple v. Grand River Dam Authority*, 145 F.3d 1180, 1184 (10th Cir. 1998), *cert. denied*, 525 U.S. 1069 (1999) with that conducted by the Sixth Circuit in this case, nor could they. Therefore, a conflict between the Circuits exists and the Petition should be granted.

B. The authority of Congress to delimit the jurisdiction of the courts of the United States is not at issue.

Respondents assert that Federal is unreasonably requesting this Court to strike down every jurisdictional limitation on the courts of the United States. Although this Court would surely have the power and obligation to do so if all these jurisdictional statues were unconstitutional, that is not what Federal argues or seeks. Federal does not question the authority of the Congress to limit diversity jurisdiction to where the amount in controversy exceeds $75,000 or otherwise.

Federal's assertion is much less expansive and a point upon which Respondents appear to agree. Federal simply asserts that where Congress *has* vested jurisdiction in a court of the United States, the power so vested is Constitutional in origin and that were jurisdiction so vested is denied, the right violated is of constitutional import.

Respondents admit this to be the case on page 17 of their brief: "Provided a party meets the jurisdictional requirements set forth by Congress to maintain an action in federal court, a person's constitutional right to proceed against a citizen of another state cannot be infringed." Here, Federal has argued before the District Court and the Sixth Circuit that the direct action proviso in 28 U.S.C. §1332(c) is inapplicable because this action does not involve liability insurance, but rather, uninsured/underinsured motorist coverage and because this proviso is inapplicable where an insured sues his or her own insurer. Outside of Ohio, the courts are in accord on these points. Further, the statutory history of the Section 1332(c) proviso removes any doubt concerning the intended application of this statute.

Nonetheless, the District Court found the Section 1332(c) proviso applicable here. Congress intended and provided for the district courts to have jurisdiction in cases such as this, however. Therefore, Federal's constitutional rights were, as Respondents admit, violated by the remand order.

In fact, this issue brings to point the misapprehension in Respondents' argument that no conflict exists. Respondents fail to apprehend the import of the Third Circuit's holding that "courts will not impose restrictions on access to appellate review [of constitutional issues] unless Congress has expressed that intent by clear and convincing evidence." *In re TMI Litigation Cases Consolidated II*, 940 F.2d at 845 citing, *Webster v. Doe*, 486 U.S. 592, 603 (1988). The Third Circuit has "not [found] clearly expressed congressional intent which would preclude review" of constitutional issues raised in a remand order based upon want of subject matter jurisdiction. *Id.* Thus, as Federal raised an issue of admittedly constitutional import, the Sixth Circuit should have reviewed the remand order at least for error of constitutional import.

Respondents' insufficient attempts to harmonize the conflicting authority of the Circuits with reference to the collateral order doctrine and mischaracterization of Federal's constitutional arguments only serve to emphasize the need for this Court's intervention.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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